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No. 87-832

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES ARNOLD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission as an excited utterance of statements made by petitioner's daughter to her school counselor violated the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bourjaily v. *United States*, No. 85-6725 (June 23, 1987)	9
California v. *Green*, 399 U.S. 149 (1970)	9
Dutton v. *Evans*, 400 U.S. 74 (1970)	8
Haggins v. *Warden*, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984)	6
McLaughlin v. *Vinzant*, 522 F.2d 448 (1st Cir.), cert. denied, 423 U.S. 1037 (1975)	6
Ohio v. *Roberts*, 448 U.S. 56 (1980)	7, 8
Puleio v. *Vose*, 830 F.2d 1197 (1st Cir. 1987)	6
Tennessee v. *Street*, 471 U.S. 409 (1985)	8
United States v. *Cree*, 778 F.2d 474 (8th Cir. 1985)	6
United States v. *Inadi*, 475 U.S. 387 (1986)	7, 8
United States v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981)	6
United States v. *Moore*, 791 F.2d 566 (7th Cir. 1986)	6

Constitution, statute and rules:

U.S. Const. Amend. VI (Confrontation Clause)	5, 7, 8, 9
Uniform Code of Military Justice, art. 134, 10 U.S.C. 934	1-2
Mil. R. Evid.:	
Rule 304(g)	2
Rule 803(2)	4, 5
Rule 803(24)	4

Miscellaneous:

C. McCormick, *Handbook of the Law of Evidence* (E. Cleary ed. 1972)	8

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-12a) is reported at 25 M.J. 129. The opinion of the Army Court of Military Review (Pet. App. 13a-16a) is reported at 18 M.J. 559.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1987. The petition for a writ of certiorari was filed on November 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Mannheim in the Federal Republic of Germany. He was convicted of taking indecent liberties with and committing indecent acts upon his daughter, a child under the age of 16, in violation of Article 134 of the Uniform Code of Military Justice

(UCMJ), 10 U.S.C. 934. He was sentenced to confinement for five years, forfeiture of his pay, a reduction in rank, and a bad conduct discharge. The convening authority reduced the period of confinement to three years, but otherwise approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 13a-16a). The Court of Military Appeals affirmed (*id.* at 1a-12a).

1. On November 13, 1981, petitioner orally confessed to having sexually molested his teenage daughter, Charise. He also provided a written, sworn, and signed confession to an agent of the Army's Criminal Investigation Division (CID) (GX 4; Tr. 200-202). Petitioner admitted that he had entered his daughter's bedroom on the night of November 5, intending to teach her about sex and to have sexual intercourse with her (*ibid.*). He acknowledged that he had rubbed her thigh with his hand and pulled his penis from his trousers, but he said that he left the room when his daughter started to cry and just before his wife got out of the shower. Petitioner also explained that, a short time after he went to bed, he heard Charise crying, he put his clothes on, and he went to check on her. According to petitioner, his oldest son was standing by his bedroom door and said that he heard Charise crying. Petitioner said that he re-entered Charise's bedroom; she said that nothing was wrong, and petitioner returned to his bed.[1]

To corroborate petitioner's confession,[2] the government introduced statements made by his daughter to her school counselor, to a nurse, and to a CID agent on the morning after the assault. At the first opportunity on the morning after the assault, Charise contacted her school counselor

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[1] Petitioner recanted his confession at trial (Tr. 240-243).

[2] Under military law, a defendant's confession may be considered as evidence of his guilt only if independent evidence, direct or circumstantial, sufficiently corroborates the essential facts of the confession to justify an inference that it is truthful. Mil. R. Evid. 304(g).

and attempted to speak with him. According to the counselor, Charise was "very, very agitated" at that time, and her physical and emotional appearance was very different from what it normally was. Charise was normally "very bubbly," but that morning she seemed agitated and "very, very subdued" (Tr. 152; Pet. App. 3a).

Charise went on to her first two classes and then returned to the counselor's office. She was very quiet and subdued. Her first words to the counselor were, "Is the father supposed to be the first one to have sex with you?" The counselor asked, "Why are you asking this?" That question, he testified, "just opened the gate" (Tr. 152-153). The counselor said that, without leading questions or prompting, Charise broke into tears and poured out the details of her father's assault (Tr. 155; Pet. App. 3a).

Charise told the counselor that, on the previous night, petitioner accosted her in the kitchen of their home by fondling her pubic area (Tr. 153-154). Charise asked what was going on, and petitioner responded, "I just wanted to check out your reaction with boys" (Tr. 154). Later that night, petitioner entered Charise's bedroom after she had gone to bed. Petitioner told her to remove her underpants, and she obeyed. He then left the room because his wife was apparently just getting out of the shower. He instructed his daughter to leave her underpants off (Tr. 154-155, 170). Petitioner returned to his daughter's bedroom later, removed his penis from his pants, got on top of her, and attempted to have sexual intercourse with her. He told her that a father was supposed to be the first one to have sex with his daughter (Tr. 156-157). A noise from his wife's room caused petitioner to leave Charise's room. Before leaving, however, petitioner warned Charise that she was not to tell anyone about what he had done, and he reminded her that he had a gun (Tr. 157). Charise was crying as her father left (Tr. 156-157).

After Charise related the events of the previous evening, she was asked to repeat her story to the school nurse. Later that day, Charise gave a consistent sworn statement to a CID agent (GX 5). Charise recanted that statement on December 22 (GX 6).[3]

2. At trial, Charise's statement to the school counselor, the nurse, and the CID agent were offered in evidence to corroborate petitioner's confession. Over objection, the trial judge admitted the statements to the school counselor and to the nurse under Mil. R. Evid. 803(2) as excited utterances (Tr. 107).[4] Also over objection, the trial judge admitted Charise's statement to the CID agent under Mil. R. Evid. 803(24), the residual hearsay exception (Tr. 188-189, 192). Charise did not testify for the prosecution, nor did petitioner call her to disclaim the truth of any of her statements.

3. The Army Court of Military Review affirmed (Pet. App. 13a-16a). The court held that Charise's statements to her school counselor were properly admitted as excited utterances (*id.* at 14a). The court also held that it was error for the trial judge to admit the statements Charise made to the school nurse and to the CID agent, but that, because those statements were cumulative, the error was harmless (*id.* at 14a-16a).

4. The Court of Military Appeals affirmed by a divided vote (Pet. App. 7a). In an opinion announcing the judgment of the court, Judge Cox concluded that

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[3] Judge Cox noted that Charise lived at home during the period prior to the trial and that "[t]heoretically, the lapse of time between the date of the incident and the trial was sufficient to permit this young girl to be pressured in various ways not to testify" (Pet. App. 8a n.4). In fact, the prosecutor represented to the trial judge on the morning of trial that he could not find Charise even after checking her home and school (Tr. 102; see also Tr. 142-144).

[4] Mil. R. Evid. 803(2) was adopted without change from the Federal Rules of Evidence.

Charise's unsolicited and spontaneous statements to her school counselor while she was "very, very agitated" and "under the threat of being shot by her father" constituted excited utterances (*id.* at 6a-9a). Judge Cox added that, as a long-established and well-recognized exception to the hearsay rules, the exception for excited utterances is so firmly rooted that statements introduced under that exception are sufficiently reliable to satisfy the Confrontation Clause even in the absence of cross-examination of the declarant (*id.* at 7a). Under such circumstances, he concluded, the proponent of the evidence need not show that the witness is unavailable to testify at trial (*ibid.*). Judge Sullivan concurred in the judgment (*id.* at 8a-9a). He stated that petitioner's confession was sufficiently corroborated by other circumstantial evidence so that his conviction could be affirmed without addressing the admissibility of Charise's excited utterances (*id.* at 8a). Judge Sullivan also concluded, however, that Charise's statements to her school counselor constituted excited utterances under Mil. R. Evid. 803(2) because of her father's threats (Pet. App. 8a). Chief Judge Everett dissented. In his view, Charise's statements to the school counselor were not excited utterances, because of the delay between the time of the incident and the time that she made the statements (*id.* at 9a-11a).

ARGUMENT

Petitioner claims that his daughter's statements to her school counselor were admitted into evidence in violation of the Confrontation Clause of the Sixth Amendment. Petitioner's claim, however, is quite narrow. Petitioner does not maintain that his daughter's statements were not excited utterances,[5] nor does he contend that excited ut-

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[5] The lapse of time between the crime and Charise's statements, "although relevant[,] is not dispositive" of the question whether her

terances do not fit within a firmly-rooted exception to the hearsay rule.[6] Instead, petitioner argues that his daughter's statements should not have been admitted, because the government failed to show that she was unavailable to testify at trial and because her statements were not sufficiently reliable. Neither claim has merit.

1. Although petitioner now contends that the government should have been required to prove that his daughter was unavailable to testify at trial before the trial court admitted Charise's statements to her school counselor, petitioner did not object to the admission of her statements on that ground. Moreover, on the morning of trial the prosecutor represented to the court that he could not find Charise, who was living at home at the time, even after having two other government witnesses (the school counselor and nurse) look for her at home and at school (Tr. 102; see also Tr. 142-144). Thus, the record suggests that Charise was in fact unavailable to testify, and if petitioner had objected to her testimony on the ground that she was available, the court would have been justified in making a finding of unavailability. In any event, the government was not required to prove that Charise was unavailable before her statements to her school counselor could be admitted at trial.

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statements fit within the excited utterance exception to the hearsay rule. *United States* v. *Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

[6] The courts of appeals have agreed that the excited utterance exception is firmly rooted in the common law. *Puleio* v. *Vose*, 830 F.2d 1197, 1205-1206 (1st Cir. 1987) (citing a long history of cases over the past 200 years approving the excited utterance exception); *United States* v. *Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); *McLaughlin* v. *Vinzant*, 522 F.2d 448, 450 (1st Cir.), cert. denied, 423 U.S. 1037 (1975); see also *Untied States* v. *Cree*, 778 F.2d 474, 502 (8th Cir. 1985) (Oliver, J., dissenting).

Petitioner relies (Pet. 6) on *Ohio* v. *Roberts*, 448 U.S. 56 (1980), as support for his claim that the government should have been required to prove that his daughter was unavailable. *Roberts*, however, does not require proof of the declarant's unavailability as a prerequisite to the admission of every out-of-court statement. *Roberts* involved the question whether the admission at trial of testimony given at a preliminary hearing violated the Confrontation Clause, and the cases cited and discussed in the Court's opinion involved the introduction at trial of testimony given at a prior judicial proceeding. 448 U.S. at 65, 74. The statement in *Roberts* on which petitioner relies (Pet. 6, quoting *Roberts*, 448 U.S. at 66)—that an out-of-court statement is inadmissible unless the declarant is shown to be unavailable—must be read in light of the facts of that case. As this Court subsequently explained in *United States* v. *Inadi*, 475 U.S. 387, 394 (1986) (citations and footnote omitted), "*Roberts* simply reaffirmed a long-standing rule * * * that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."

Although petitioner claims that *Inadi* stands only for the proposition that co-conspirator declarations can be introduced without the need to show that the declarant is unavailable, the rationale of *Inadi* is broader than that. The Court in *Inadi* distinguished prior testimony—which requires a showing of unavailability—from other kinds of testimony, not just from co-conspirator declarations. While former testimony "often is only a weaker substitute for live testimony," the Court explained, other exceptions to the hearsay rule have "independent evidentiary significance of [their] own" (475 U.S. at 394).

That analysis applies to excited utterances. Like a co-conspirator declaration, an excited utterance "often will derive its significance from the circumstances in which it was made." *Inadi*, 475 U.S. at 395. As in the case of a co-conspirator declaration, an excited utterance may be even more reliable than subsequent in-court testimony, because the relationship between the parties at the time of trial may significantly affect the reliability of the evidence the declarant gives from the stand. Thus, like co-conspirator declarations, excited utterances "derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." 475 U.S. at 395-396.

Concerns over reliability do not justify requiring the government to prove that a declarant is unavailable before the trial court may admit excited utterances. The primary function of the Confrontation Clause is to enhance the reliability of the factfinding process at trial.[7] The historical process of defining exceptions to the hearsay rule has identified classes of out-of-court statements that are particularly reliable. For that reason, the Court has explained that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Roberts*, 448 U.S. at 66.

Excited uttterances have historically been admissible as exceptions to the hearsay rule, because they are made under circumstances indicating that they are sincere and are ordinarily made before a person develops a motive to fabricate. See C. McCormick, *Handbook of the Law of Evidence* § 297, at 704 (E. Cleary ed. 1972). For those reasons, excited utterances carry sufficent guarantees of

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[7] "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process" (*Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion)). See also *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985); *Roberts*, 448 U.S. at 66.

reliability that the additional safeguard of cross-examination is not constitutionally required. Excited utterances are admissible without a showing of unavailability, not because the Confrontation Clause is "a mere codification of the rules of hearsay," but because an excited utterance is one example of the situation where "the overlap is complete" between the constitutional provision and the hearsay rules (*California* v. *Green*, 339 U.S. 149, 155 (1970)), and cross-examination is not necessary to insure reliability.

2. Although petitioner concedes that the excited utterance exception is a firmly rooted exception to the hearsay rule (Pet. 9), he maintains that his daughter's excited utterance lacked sufficient indicia of reliability to satisfy the Confrontation Clause. That claim lacks merit. As this Court explained in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 10 (citation omitted), "*Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. * * * [N]o independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' " In any event, even if the trial court was required to determine whether Charise's statements to her school counselor were trustworthy, petitioner's own confession provided powerful corroboration of his daughter's statements. Moreover, the evidence that Charise had suffered some psychological trauma, along with the impulsive, nondeliberative nature of her statements, also tends to show that the statements were reliable. Finally, there was no evidence that Charise had any motive to fabricate her accusations. Under these circumstances, Charise's statements to her school counselor were sufficiently reliable to justify their admission even though she was not present at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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